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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)

Amendment of the Commission's Rules)
and Policies to Increase Subscribership and)
Usage of the Public Switched Network)

CC Docket No. 95-115

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COMMENTS OF GATEWAY TECHNOLOGIES, INC.

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SUMMARY

Although the bulk of the Commission's suggestions for increasing telephone subscribership appear legitimate and desirable, the NPRM's alternative proposal to preclude disconnection of local service for non-payment of interstate charges is both ill-conceived and unworkable. The Commission should implement narrowly targeted programs designed to remedy any remaining deficiencies in the geographic availability and affordability of telecommunications services—its traditional universal service goals—through call-blocking and related long-distance restrictions, revised connection and deposit policies, expanded LinkUp assistance, and educational outreach for more effectively disseminating available universal service financial support.

The NPRM's proposal on disconnection for non-payment ("DNP") would establish an unwarranted (and likely unlawful) policy that would reward financial irresponsibility, massively increase long-distance carriers' bad debt expenses, and produce higher interstate rates for end users nationwide. The question relevant from a universal service perspective is not whether disconnection can be prevented, but whether disconnection is caused by affordability considerations. There is no linkage between disconnection and the policy objectives of universal service. Even if there were, the proposed DNP rule is overbroad, not targeted to the consumers who have problems controlling long-distance usage, and is more costly than available alternatives for reducing consumption of long-distance services among low-income subscribers in order to protect basic telephone access.

The focus of the Commission's proposals for long-distance call-blocking services is on voluntary blocking options for traditional interstate services. It is not clear from the NPRM's description, however, whether these call-blocking services would apply beyond ordinary "1+" presubscribed services. As a leading provider of collect calling services for inmates and correctional institutions, Gateway urges the

Commission to reformulate any call-blocking rules to ensure the availability of collect-calling restrictions and to allow "semi-voluntary" application by carrier implementation of calling restrictions, upon reasonable notice to subscribers.

There are substantial questions associated with the Commission's legal authority to prescribe a "no-disconnect" rule and to preempt state disconnect policies. These are legal issues that the Commission should avoid raising unless absolutely necessary. Because a "non-disconnection" policy is a vastly overbroad and costly way to increase telephone subscribership in America, there is no reason to reach these difficult, and undoubtedly contentious, issues of federal-state legal relations.

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COMMENTS OF GATEWAY TECHNOLOGIES, INC.

Gateway Technologies, Inc. ("Gateway"), by its attorney, hereby responds to the Commission's request for comment¹ on a range of proposals for increasing telephone subscribership in the United States.

Although the bulk of the Commission's suggestions appear legitimate and desirable, the NPRM's alternative proposal to preclude disconnection of local service for non-payment of interstate charges is both ill-conceived and unworkable. The Commission should implement narrowly targeted programs designed to remedy any remaining deficiencies in the geographic availability and affordability of telecommunications services—its traditional universal service goals—rather than creating an unwarranted (and likely unlawful) policy that would reward financial irresponsibility, massively increase long-distance carriers' bad debt expenses, and produce higher interstate rates for end users nationwide.

INTRODUCTION

The Commission's NPRM recognizes that there has been "continued overall growth in subscribership" throughout the past 50 years, in which telephone service has expanded from 37% to almost 94% of United States households. Notice at 2. Noting

¹ Amendment of the Commission's Rules and Policies to Increase Subscribership and Usage of the Public Switched Network, Notice of Proposed Rulemaking, CC Docket No. 95-115, FCC 95-281, (released July 20, 1995)("NPRM" or "Notice").

significant variations in subscribership levels among ethnic groups, income levels and geographic regions, however, the Commission solicits comment on the reasons for such results and on a variety of "narrow, targeted solutions" proposed as a means of increasing subscribership. *Id.* at 3.

These new and revamped programs include, among others, call-blocking and related long-distance restrictions, revised connection and deposit policies, expanded LinkUp assistance, and educational outreach for more effectively disseminating available financial assistance to low-income households. Based on the FCC's "universal service" obligations under Section 1 of the Communications Act, 47 U.S.C. § 151, these proposals all are linked to the traditional, twin-pronged definition of universal service: connectivity (geographic availability of service) and affordability (rate reasonableness and socially desirable subsidies). *See id.* at 4. Thus, for instance, revising the relationship between deposit/connection fees and a new subscriber's financial history, including election of long-distance call restrictions, in order to reduce these fees increases affordability of telephone services and is generally in the public interest.

This linkage breaks down, however, where the NPRM proposes, as an alternative, that the Commission prohibit local service disconnection for non-payment of long-distance charges (*i.e.*, preempt all state rules to the contrary) in order to increase telephone subscribership levels. It is a mere tautology to state that if end users cannot be disconnected for non-payment of their telephone bills, subscribership will increase; precluding disconnection by definition prevents attrition and increases subscribership. The question relevant from a universal service perspective, however, is not whether disconnection can be prevented, but whether disconnection is caused by affordability considerations. In other words, if there is a problem with the prices of interstate services, then the Commission should attack it directly. Similarly, if the inability to control interstate usage is undermining affordability for some subscribers (NPRM at 7), then the

Commission's remedy should be a "narrow, targeted solution" designed to redress the problem of cost control.

The NPRM's proposal to prohibit disconnection of local telephone service for non-payment of interstate charges is itself entirely disconnected from the traditional goals of universal service. Disconnection for non-payment has nothing to do with the geographic availability or rate affordability of telephone service. Moreover the proposal would create perverse incentives, encouraging low-income subscribers to make almost unlimited long-distance calls, to carrier-shop and to engage in a variety of other unacceptable activities with virtual impunity. In other words, precluding local disconnection is little more than a license to steal, a guaranteed way to cause enormous increases in long-distance carriers' bad debt, and in turn produce significant rate increases for all reputable, bill-paying subscribers to cover the increased cost of carrier uncollectibles.

The better approach—one closely tied to the principles of universal service—is to expand the availability of tools that consumers and carriers can use to control long-distance charges before subscriber default, and thus disconnection, becomes necessary. These include the targeted solutions, discussed in the NPRM, for affordable provision of voluntary call-blocking services. If expanded to include collect call blocking and to permit (with reasonable notice) carrier-initiated long-distance restrictions, such options would go far to reduce non-payment disconnections without doing violence to universal service principles or interstate carrier bad debt accounts.

Importantly, there are substantial questions associated with the Commission's legal authority to prescribe a "no-disconnect" rule and to preempt state disconnect policies. These are legal issues that the Commission should avoid raising unless absolutely necessary. Because a "non-disconnection" policy is a vastly overbroad and costly way to increase telephone subscribership in America, there is no reason to reach these difficult, and undoubtedly contentious, issues of federal-state legal relations.

I. DISCONNECTION FOR NON-PAYMENT IS UNRELATED TO ANY OF THE COMMISSION'S LEGITIMATE UNIVERSAL SERVICE GOALS

The NPRM suggests that the universal service policy of Section 1 of the Act supports Commission efforts to increase telephone subscribership by preventing or remedying disconnection for non-payment. NPRM at 3-4, 6, 13. Yet the Notice does not attempt to define universal service or place the proposed rules in the context of universal service goals as traditionally applied by the Commission. A close analysis demonstrates that the NPRM's suggested use of universal service policy as a basis for eliminating carriers' disconnection remedies is inconsistent with long-accepted notions of universal service.

There are two principal objectives underlying the Act's universal service policy. First, telephone usage is not possible where geographic coverage does not extend to a potential end user's location. Thus, connectivity, or the geographic scope of the local telephone network, is a key ingredient of universal service. Second, even where physical connection is possible, end users may still lack access to the telephone where they do not have the resources to pay for services. Thus, affordability—which includes both rate reasonableness and subsidies supporting below-cost rates for appropriate social welfare reasons—is the second key ingredient of universal service. Indeed, today affordability is increasingly considered the sine qua non of universal service, closely associated with a complicated system of internal subsidies “predicated on rates . . . that require implicit cost shifting . . . through both local rates and access charges to interexchange carriers.”²

² E.g., S. 652, 104th Cong., 1st Sess. § 103(a). See NTIA Telecom 2000, at 31 (“[T]he traditional US practice in this sector of funding socially or politically desirable objectives indirectly thorough internalized transfers persists, with little apparent short-run prospect of reversal.”) Although the 1934 Act does not define (or even expressly mention) “universal service,” there is little question that connectivity and affordability are the key underpinnings of a legitimate universal service policy. In the telecommunications bills passed this Summer by both the House of Representatives and the Senate, “universal service” is specifically defined as encompassing both geographic availability and affordability. The Senate bill provides that universal service is an “evolving level” of telecommunications services that (Footnote continued on following page)

These twin goals of universal service³ are implicitly reflected in the NPRM's discussion of methods that would "make extending local exchange service to unserved areas more economically feasible" and "reduce obstacles that prevent those who want phone service from being able to afford it." NPRM at 4. Yet it is clear that neither connectivity nor affordability are advanced where a consumer has used but refuses to pay for telecommunications services. Universal service is designed to help ensure affordable rates for low-income or other groups meriting subsidized service, not as a way to protect financially irresponsible consumers, or simple deadbeats, from the economic consequences of their purchasing decisions. There is not a business in the country, telecommunications or otherwise, that would not experience significant increases in market penetration and "subscriberhip" if its services were effectively free of charge!

The erroneous assumption in the Notice is that end users who fail to pay their long-distance charges merit the same preferred treatment accorded consumers who cannot afford to purchase telephone service in the first place. As a result, the NPRM's alternative proposal for precluding local disconnection for interstate non-payment offers little more than a free ride to users who either cannot or will not pay their long-distance bills. To the extent that failure to pay is a consequence of insufficient financial resources, prohibiting disconnection for non-payment ("DNP") does nothing to address the underlying affordability of telecommunications service. To the extent that

(a) should be provided "at just, reasonable and affordable rates to all Americans," (b) "are essential in order for Americans to participate effectively in the economic, medical, and democratic processes of the Nation," and (c) are "subscribed to by a substantial majority of residential customers." 652, 104th Cong., 1st Sess. § 103. The House bill, in turn, includes a similar definition of universal service, and states that the Commission should pursue universal service by "seek[ing] to promote access to advanced telecommunications services and capabilities, and to promote reasonably comparable services for the general public in urban and rural areas, while maintaining just and reasonable rates." H.R. 1555, 104th Cong., 1st Sess. § 101 (adding Section 247 to the Act).

³ Some have termed these two goals "dialtone" and "support," in that basic local service provides a dial tone connection, and affordability has been furthered through financial support programs and pricing designed to hold rates for residential local exchange service below cost. See, e.g., Avery, What Level of Dialtone Penetration Constitutes "Universal Service"?, in 1 Proceedings of the Ninth NARUC Biennial Regulatory Information Conference 143, 157 (NRRI 1994).

failure to pay is the result of financial mismanagement, or of deliberate credit fraud, the Commission's proposal is completely at odds with universal service, representing instead a kind of monetary "pardon" inconsistent with settled principles of market economics and personal responsibility. Thus, instead of furthering any valid universal service objectives, prohibiting DNP on an interstate basis would twist that ideal until it became virtually unrecognizable.

The NPRM takes pains to point out the self-evident: that a majority of Americans without telephone service have been disconnected for non-payment, particularly of long-distance bills, in the past. NPRM at 11. This fact alone is plainly an insufficient basis for the NPRM's proposed DNP policy, because there is nothing connecting these routine consumer credit problems with the affordability concerns animating universal service. Insofar as the Commission may find that a substantial majority of disconnections have been caused by an inability to curtail usage—in other words, the absence of safeguards (like charge card credit limits) allowing consumers to manage their own telecommunications finances—there would then be a plausible link to affordability. Where the Commission can "give consumers the ability to select offerings that would enable them to better control their long-distance usage," *id.* at 6, it would simultaneously encourage financial responsibility and provide reputable end users with increased options for making telecommunications services more affordable in a practical, real-world sense.

These considerations appear to adequately support the NPRM's proposals for mandatory, reasonably priced provision of call-blocking services (or such other financial management tools as preset monthly charges or minutes of use), for revision of deposit and collection policies to reduce subscription costs for disconnected consumers who utilize usage-control services, and for expansion of LinkUp and related programs to subsidize basic and long-distance service connections. As the Notice recognizes, the Commission's goal "is to develop narrow, targeted solutions to meet the needs of this

set of consumers.” NPRM at 3. While there are alternatives presently available in the marketplace—including debit cards—that allow end user self-management without the costs required for implementation of new LEC-provisioned call blocking services,⁴ the issue here is one of cost/benefit balancing, on which the NPRM has properly requested comment. E.g. NPRM at 9.

On the other hand, prohibition of DNP for consumers who fail to pay long-distance charges is an overbroad, unconstrained solution that would sweep in consumers who refuse to pay along with those who cannot pay. Universal service was not designed as a policy to protect Americans from the consequences of their purchasing decisions. The question is not balancing costs and benefits associated with increasing affordability of long-distance services, but instead whether affordability should include a regulatory protection for deadbeats. If indeed there are consumers who “get in over their heads” on long-distance bills because of an inability to monitor or control usage, the Commission’s targeted call-blocking solutions provide a remedy that does no violence to traditional American principles of individual responsibility. The alternative proposal for prohibiting local disconnection, on the other hand, is neither targeted to that class of customers nor consistent with the basic notion that consumers are held accountable financially for their consumption activities.

⁴ In addition to debit cards, which have pre-set (and consumer selectable) usage limits by varying “face amounts,” many interstate carriers today offer service options that permit subscribers to control their long-distance bills through pre-set spending limits. For ordinary “1+” service, numerous carriers allow customers to subscribe to real-time usage tracking services, using technology similar to debit card services, except that charges are billed in arrears instead of up front. In Gateway’s market—collect calling services for correctional institutions and inmates—carriers routinely set customized monthly account limits based on historical usage, protecting called parties (who are responsible for collect charges) from inadvertently exceeding their ability to pay.

II. PROHIBITING LOCAL SERVICE DNP FOR INTERSTATE LONG-DISTANCE CHARGES WOULD INCREASE OVERALL INTERSTATE RATES AND ENCOURAGE END USER FINANCIAL IRRESPONSIBILITY

Although the NPRM explains that it is not proposing to prohibit disconnection (or blocking) of interstate long-distance services for non-payment, it nonetheless fails to recognize the unwarranted and counterproductive consequences of a rule prohibiting local disconnection for non-payment of interstate charges. Such an approach would cause a massive increase in long-distance carriers' bad debt,⁵ shifting the costs associated with non-payment to the remaining consumers and thus increasing overall interstate rates. It would also create a system of perverse incentives, in which end users would be encouraged to engage in precisely the kind of thoughtless over-consumption that has led to the disconnect "problem" the NPRM seeks to solve.

The bad debt consequence is straightforward. In Gateway's experience, uncollectible rates are twice as high in states that prohibit local disconnection for long-distance non-payment. Bad debt is a cost of doing business, and all service providers set their rates based on predictions of bad debt drawn from historic uncollectible ratios. It is obvious, therefore, that the Commission's proposal would increase costs for long-distance carriers, costs that ultimately would be spread among all other end users and recovered from overall interstate rates. Simply put, precluding local disconnection will increase bad debt, in turn increasing interstate rates. As the Commission stated in 1989, where it deferred to the states on interstate DNP policies, "the removal of DNP as a potential remedy for nonpayment would result in many unpaid bills, with the cost of those uncollectibles ultimately being borne by all end users through higher toll charges." Public Service Commission of Maryland, 4 FCC Rcd. 4000, 4007 n.21 (1989).

⁵ One major reason that uncollectible rates, as noted below, are so much lower in states that allow local service disconnection is that the enforcement leverage associated with potential loss of telephone access, instead of only long-distance calling, is enough to motivate a substantial majority of consumers to bring their long-distance accounts current prior to a disconnection deadline.

The behavioral consequences of a “no disconnect” policy are equally obvious. First, end users with financial difficulties would have a reduced incentive to pay their long-distance bills, because non-payment would result only in blocking of outgoing interstate calls—with local and inbound interstate service unaffected. Second, and relatedly, allowing interstate usage with relative monetary impunity would encourage excessive consumption of long-distance services, increasing the size of the very problem the NPRM is proposing to address. Third, consumers acting in less than good faith would have the ability to engage in an array of fraudulent activities, some with far-ranging consequences. For instance, an end user could accept collect calls repeatedly with no intention to pay, secure in the knowledge that his telephone service (and in most cases “1+” long-distance service as well, unless the collect carrier and presubscribed carrier are identical) would be unaffected by failure to pay. Other consumers would simply run up huge long-distance bills and effectively “skip town” by carrier shopping; a \$5 charge for switching long-distance carriers is a small price to pay for the freedom to make unlimited interstate calls without loss of one’s telephone.⁶

These adverse consequences are not necessary, because the NPRM itself identifies a range of more focused options for dealing directly with the problem of long-distance disconnects tied to legitimate affordability considerations. Therefore, the alternative proposal should be rejected, even if prohibiting interstate DNP were consistent with the policy objectives of universal service. The costs of this overbroad approach vastly outweigh any marginal benefit it could achieve.

⁶ Efforts to form an interexchange carrier credit history information service may, in time, reduce the scope of this problem. The National Telecommunications Data Exchange, a trade association of long-distance providers, reports that its credit history database has become operational within the past month.

III. THE COMMISSION SHOULD REFORMULATE ITS CALL-BLOCKING PROPOSALS TO COVER COLLECT CALLING SERVICES

The focus of the Commission's proposals for long-distance call-blocking services is on voluntary blocking options for traditional interstate services. NPRM at 16-20. It is not clear from the NPRM's description, however, whether these call-blocking services would apply beyond ordinary "1+" presubscribed services. As a leading provider of collect calling services for inmates and correctional institutions,⁷ Gateway urges the Commission to reformulate any call-blocking rules to ensure the availability of collect-calling restrictions.

Some of the NPRM's language suggests that the Commission may be aware of this issue. Thus, the Notice discusses a call-blocking scheme under which subscribers would be able "to place" local, collect, 800 and related calls and "to receive interstate long-distance telephone calls for which they would not be charged." NPRM at 8. Plainly, usage controls will be unworkable if restrictions are outbound only, allowing easy circumvention through acceptance of collect calls. Therefore, it is essential that, if it adopts this approach, that the Commission include collect calls in the regulatory language crafted to implement a call-blocking requirement.

Gateway also believes that a semi-voluntary system of call-blocking restrictions would be preferable to a purely voluntary system. There are circumstances in which the sheer volume of fraudulent (or potentially uncollectible) calls to and from specific telephone numbers requires carriers to take prompt, and sometimes unilateral, action to block or limit subscriber access to interstate services. Fraudulent use of calling card numbers is a good example. For collect calls, however, call restrictions have typi-

⁷ Four years ago this Commission concluded, at Gateway's urging, that inmate services should be exempt from the unblocking and related regulations implemented pursuant to the Telephone Operator Consumer Services Information Act of 1990, because correctional institutions present "an exceptional set of circumstances that warrants their exclusion from [TOCSIA] regulation." Policies and Rules Concerning Operator Service Providers, Report and Order, 6 FCC Rcd. 2744, 2752 (1991)(citing Gateway's comments).

cally been imposed as a "class of service" identifier designating certain lines as "payphone" and "institutional" lines, thus allowing carriers to block completion of collect calls. This purely voluntary system may not be "portable" to the usage control applications raised by the NPRM, however, because it does not specifically indicate collect call status and because it appears to be available only as a customer option at the time of installation. A better approach is to grant carriers the ability, upon reasonable notice to the subscriber, to curtail or restrict the delivery of collect and other "paid" services in lieu of disconnection. This would be in addition to a consumer's option to self-select call usage restrictions. Because such a semi-voluntary approach would provide a less intrusive means of carrier self-help than outright disconnection, and because it could assist consumers who procrastinate or simply ignore bill-paying problems, the Commission should include it in any call-blocking scheme it develops.

IV. THE COMMISSION'S AUTHORITY TO PREEMPT STATE DNP POLICIES IS NOT CLEAR AND IS INCONSISTENT WITH THE 1992 TDDRA AMENDMENTS ON 900 SERVICE DISCONNECTION

The NPRM concludes that the Commission enjoys the statutory authority to regulate disconnection of local service as ancillary to its non-Title II jurisdiction over interstate billing and collection services. NPRM at 13-14. That is not necessarily the case. In its 1989 Maryland Public Service Commission decision, the Commission held only that it has the jurisdiction to preempt state rules on DNP. 4 FCC Rcd. at 4001, 4006. The MPSC order did not preempt, and it did not decide whether an order precluding disconnection would satisfy the stringent legal standards applicable to federal preemption of state regulation. That decision was not subject to judicial review, moreover, and the Commission's theory of "ancillary ancillary" jurisdiction has never been tested.

More significantly, that the Commission may have the power to order preemption does not mean that it can meet the stringent requirements for overriding state regulation of DNP. First, even where state and interstate use of a service or equipment is inseparable, there must be an "actual conflict" between state and federal regulation in

order for the latter to supersede.⁸ Bootstrapping into preemption by asserting the power to preempt does not meet this standard, because it begs the question of whether there is any justification for a uniform federal policy on disconnection. Second, the NPRM's express invocation of universal service policy as a basis for preemption, see NPRM at 14,⁹ begs the question, since as addressed above there is no linkage between accepted universal service policy and disconnection for non-payment.

Finally, it is highly questionable whether the Commission actually enjoys the legal authority the NPRM claims from the broad terms of the Act. See NPRM at 14, citing 47 U.S.C. § 153(a). In the Telephone Disclosure and Dispute Resolution Act of 1992, 47 U.S.C. § 228, Congress provided that a common carrier "may not disconnect a subscriber's local exchange telephone service" for non-payment of charges for pay-per-call ("900") services. Id. § 228(c)(3). Because the Commission had earlier ruled that disconnection for 900 payment was impermissible,¹⁰ there would have been no need for Congress to add Section 228(c)(3) if the Commission actually enjoyed the unquestioned statutory authority over DNP that it now claims. (By the same token, it is significant that the Pennsylvania non-disconnection policy presented by the NPRM as a model approach was the product of legislative action, rather than regulatory fiat.)¹¹

In any event, as is clear from an examination of the 900 Services proceeding, the Commission has never before claimed authority to preempt state regulation of dis-

⁸ Application of state law can be preempted in three circumstances: first, if the statute in question expressly preempts state law; second, where Congress has implicitly preempted state authority by fully occupying the field with a comprehensive regulatory scheme; and third, when state law actually conflicts with federal law or policy. Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608, 2617 (1992). Preemption is justified under the "actual conflict" prong where (a) a communications service cannot technically or practically be separated into intrastate and interstate components, and (b) state regulation would conflict with federal policy. E.g., National Ass'n of Regulatory Util. Comm'rs v. FCC, 880 F.2d 422, 429-30 (D.C. Cir. 1989); Policies and Rules Concerning Interstate 900 Telecommunications Services, 6 FCC Rcd. 6166, 6180-81 (1991).

⁹ "LEC disconnection of service directly implicates our ability to carry out the universal service objective or making telephone service available to all people of the United States." NPRM at 14.

¹⁰ Policies and Rules Concerning Interstate 900 Telecommunications Services, Report and Order, 6 FCC Rcd. 6166 (1991).

¹¹ NPRM at 13 n.40 (citing 52 Pa. Code §§ 64.1 et seq.).

connection for non-payment of tariffed, Title II interstate communications services. The 900 services involved in that proceeding were enhanced "information" services, and the Commission clearly indicated that the source of the Communications Act problem with disconnection for nonpayment was that "access to basic telecommunications services should not be jeopardized by non-payment of charges that are unrelated to transmission services."¹² The charges involved in the interstate communications services under consideration in this docket, in contrast, are directly related to transmission.


Thus, for the Commission to take the preemptive action on DNP that it proposes as an alternative in the NPRM, it will have to reach and resolve difficult and potentially contentious issues of legislative authority. There is no necessity to do so, especially where there are adequate, workable alternatives that would be consistent with universal service policy and directly address the usage-control consumer problem with which the Commission is concerned.

¹² Policies and Rules Concerning Interstate 900 Telecommunications Services, Notice of Proposed Rulemaking, 6 FCC Rcd. 1857, ¶ 20 (1991)(emphasis supplied).

CONCLUSION

The Commission's tentative proposal for preempting state rules allowing local service disconnection for non-payment of interstate charges should be rejected. Any call-blocking options ordered for the LECs should include collect calls and should allow, with reasonable notice, carrier-initiated call blocking.

Respectfully submitted,

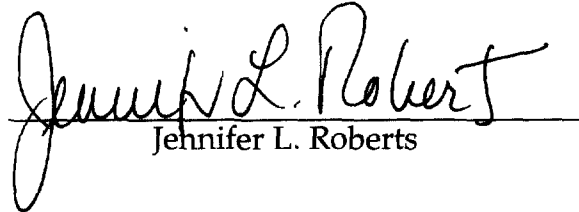
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CERTIFICATE OF SERVICE

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